Standard Chartered Bank v Yap Sing Yoke & Ors

HIGH COURT (KUANTAN) – ORIGINATING MOTION NO 32-10-87
LAMIN J
12 JANUARY 1989

Land Law – Private caveats – Priority of – First defendant charged property to plaintiff – Charge presented for registration at land office but subsequently returned due to inadequate documents supplied – No re-presentation of charge made as plaintiff's solicitors were unaware of returned documents – Private caveat lodged only some two years later – Another private caveat lodged by second defendant in the interim period – Second defendant's private caveat lodged as a result of obtaining judgment in default against first defendant for goods sold and delivered – Auction sale of land – Whether plaintiff's caveat has priority over second defendant's caveat – Returned issue document of title in plaintiff's custody all the time – Whether plaintiff's priority lost through negligence

Land Law – Private caveat lodged by second defendant after obtaining judgment in default against first defendant for goods sold and delivered – Whether second defendant had caveatable interest in first defendant's land – Whether second defendant entitled to lodge caveat – National Land Code 1965, s 323(1)

Land Law – Auction sale of charged land – Regularity of – Writ of seizure and sale obtained against first defendant for goods sold and delivered – Prohibitory order registered – Auction sale of first defendant's land on order of writ of execution – Auction sale took place one day after registration of prohibitory order – Whether auction sale irregular – Fourteen-day rule not complied with – Rules of the High Court 1980, O 47 r 7(a)

On 1 April 1985, the plaintiff accepted a charge over a piece of land held by the first defendant in consideration for granting housing loan to the first defendant. The charge was presented for registration at the Land Office and accepted. However, on 23 May 1985, the charge together with the issue document of title were returned to the plaintiff's solicitors as an official receipt for quit rent was not supplied to the Land Office. The returned documents were kept by a clerk of the firm who did not bring them to the attention of the solicitors. In early February 1986, it was discovered that the documents had not been re-presented and when an attempt was made on 7 February 1986 to register the charge, the plaintiff discovered that it could not be done as there was already a private caveat lodged on 11 June 1985 by the second defendant. This private caveat arose out of a judgment in default obtained by the second defendant on 25 June 1985 against the first defendant for goods sold and delivered. Pursuant to the judgment in default, the second defendant obtained a writ of seizure and sale against the first defendant on 7 November 1985 and on 15 November 1985 a prohibitory order was registered. Subsequently, a second and third prohibitory order were issued on 19 September 1986 and 3 March 1987 respectively.

On 4 March 1987, the plaintiff lodged a private caveat in respect of the memorandum of charge executed by the first defendant on 1 April 1985. On 6 March 1987, the land was auctioned off on the order of a second writ of execution applied for by the second defendant. The land was purchased by the third and fourth defendants.

The plaintiff applied to the court for: (a) a declaration that its charge dated 1 April 1985 and its private caveat dated 4 March 1987 have priority of right, claim and interest over that of the second defendant's private caveat dated 11 June 1985 and his two prohibitory orders dated 19 September 1986 and 3 March 1987; (b) the writ of seizure and sale, and the subsequent auction sale held on 6 March 1987 to be set aside.

Held, allowing the plaintiff's application:

(1) By virtue of the unregistered charge dated 1 April 1985 in favour of the plaintiff, the plaintiff had acquired a title in equity over the land. As the issue document of title was all the time in the custody of the plaintiff, it had acquired a lien in equity over the land. This equitable interest is not affected by the absence of a caveat. The plaintiff had the right to lodge a caveat and may do so at any time under the provisions of the National Land Code.

(2) When the second defendant lodged the caveat on 11 June 1985 after obtaining a judgment in default against the first defendant, he had no interest whatsoever upon which to base his claim to the land. The judgment in default was a judgment on a claim for goods sold and delivered. Of course he had filed a suit against the first defendant for goods sold and delivered but that too had no concern with land and even then there was no judgment as yet at the time of lodging of the caveat. In other words, the second defendant had no caveatable interest in the land on 11 June 1985. He was thus not entitled under s 323(1) of the National Land Code 1965 to lodge the caveat.

(3) Any prohibitory order issued at the instance of the second defendant was of no effect because a prohibitory order upon entry has a similar effect to that of a private caveat and neither can it affect a prior claim.

(4) The plaintiff's caveat on 4 March 1987 was properly lodged and registered to protect his interest. The question of delay in this connection is therefore not relevant.

(5) Even assuming that the second defendant had some form of equitable interest in the land, the second defendant would not have priority of equity as the plaintiff's equitable interest was first in time. Also, the plaintiff had not lost his priority of equity through his negligence as plaintiff's counsel did not realize that the documents had been returned by the Land Office and that they were all the time in the drawer of a clerk. The important thing was that the issue document of title had not parted from their possession.

(6) In the circumstances of the present case, the plaintiff's equitable charge dated 1 April 1985 and his caveat dated 4 March 1987 must prevail and the writ of seizure and sale, including the auction sale held on 6 March 1987 must be set aside.

(7) As for the question of the regularity of the auction sale, the auction contravened O 47 r 7(a) of the Rules of the High Court 1980. This was because a prohibitory order was registered on the day before the auction sale and O 47 r 7(a) states that there shall be no sale until the expiration of 14 days from the registration of the prohibitory order. The 14-day rule must be strictly complied with. For failure to do so, the sale must be set aside.

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 217 of 1988.]

Cases referred to

1 *Vallipuram Sivaguru* v *Palaniappa Chetty, Official Administrator of the Estate of Gan Inn, Deceased* [1937] MLJ 59 (refd)

2 *Mercantile Bank Ltd* v *The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196 (refd)
3 *United Malayan Banking Corporation Bhd* v *Goh Tuan Laye & Ors* [1976] 1 MLJ 169 (distd)
4 *Sockalingam Mudaliar* v *Ramasamy Chettiar & Anor* [1938] MLJ 237 (refd)
5 *Karuppiah Chettiar* v *Subramaniam* [1971] 2 MLJ 116 (distd)
6 *Zeno Ltd* v *Prefabricated Construction Co (M) Ltd & Anor* [1967] 2 MLJ 104 (refd)
7 *Re Registration of a Caveat* (1908) Innes 114 (refd)

Legislation referred to
National Land Code 1965 s 323(1)(a)
Rules of the High Court 1980 O 47 r 7(a), (e) proviso

David Wong for the plaintiff.
Tay Keng Chee for the second, third and fourth defendants.
S Sivasubramanian for the first defendant.

Cur Adv Vult

Lamin J: The facts of this case are as follows. On or about 1 April 1985 the plaintiff bank accepted a charge over property held under HS(D) 4852, Lot 24401, Mukim Kuala Kuantan from the first defendant to secure a housing loan for $92,000 with interest at the rate of 13% pa. The said charge was presented for registration to the land office and accepted vide presentation number 1170/85. But on 23 May 1985 the charge together with the issue document of title were returned to the plaintiff's solicitors as the official receipt for quit rent for the year 1985 was not supplied to the land office. When the documents were returned to the firm of solicitors, they were kept by the clerk of the firm, one Miss Catherine Thong, who did not bring them to the attention of the solicitors of the said firm. Only in early February 1986, after Miss Thong had left the firm was it discovered that the documents were all the time in her drawers and had not been re-presented. So on 7 February 1986 an attempt was made to once more register the charge. It could not be done as there was already a private caveat vide presentation number 567/85 lodged on 11 June 1985 by the second defendant, Yahya Brickworks Sdn Bhd.

In a separate action vide Kuantan High Court Civil Suit No 180/85, Yahya Brickworks Sdn Bhd, the second defendant, sued the first defendant for goods sold and delivered and obtained judgment in default on 25 June 1985. Pursuant to the said judgment, the second defendant had a writ of seizure and sale issued against the first defendant on 7 November 1985. On the same day a prohibitory order was filed and registered on 15 November 1985. On 1 July 1986, the second defendant filed an application for a second prohibitory order which was granted by the court on 4 September 1986 and issued on 19 September 1986. It was registered with the Pendaftar Hakmilik Negeri, Pahang on 2 October 1986.

The second writ of execution in respect of Kuantan High Court Civil Suit No 180/85 was filed by the second defendant on 24 February 1987. On the same day, he applied to the court for a third prohibitory order which was issued on 3 March 1987. It was registered with the Pendaftar Hakmilik Negeri, Pahang on 5 March 1987.

On 4 March 1987 the plaintiff lodged a private caveat which was registered vide caveat presentation number 114 of 1987, jilid 20, folio 31 and his grounds in support were that the first defendant had executed borang 16A (memorandum of charge) in respect of the said land on 1 April 1985 and the said borang 16A was presented for registration on 2 April 1985.

The said property was auctioned off on 6 March 1987 on the order of the abovementioned second writ of execution applied for by the second defendant and purchased by the third and fourth defendants. The full purchase price of $85,200 was paid by the third and fourth defendants to the court on 5 June 1987.

The plaintiff in this case comes to this court to seek the following reliefs as prayed for in encl 5, namely:

(a) for a declaration that the plaintiff's charge in equity dated 1 April 1985 and the plaintiff's private caveat dated 4 March 1987 have priority of right claim and interest over that of the second defendant's private caveat dated 11 June 1985 and his two prohibitory orders (dated 19 September 1986 and 3 March 1987) and that the plaintiff's said charge be duly registered, and

(b) the writ of seizure and sale issued in respect of the Kuantan High Court Civil Suit No 180 of 1985 and all proceedings thereunder including the auction sale held on 6 March 1987 be set aside.

With regard to the first prayer I propose to examine the following decided cases as cited and the position of the law and its application.

In the case of *Vallipuram Sivaguru* v *V Palaniappa Chetty, Official Administrator as Administrator of the Estate of Gan Inn, Deceased*,[1] the facts were that Gan Inn in January 1931 deposited his issue document of title with Palaniappa Chetty, the first defendant/respondent, as security for a loan and on 17 March 1932 he sold the same land to one Nagappa explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title, Nagappa could not register the transfer and as a result on 21 March 1932 he lodged a caveat against the land.

Gan Inn died on 6 April 1932, ie shortly after executing the transfer in favour of Nagappa. On 22 August 1933, Palaniappa Chettiar lodged a caveat which was registered the same day. On 8 December 1933, Nagappa sold and purported to transfer the land to S Vallipuram the plaintiff.

On 15 June 1934 Nagappa died and no personal representative of his estate was appointed. On 14 August 1934 the land was transmitted to the Official Administrator as the administrator of the estate of the late Gan Inn.

On 30 December 1935, Palaniappa Chetty commenced his action against the Official Administrator in his capacity as the administrator of the estate of the late Gan Inn. On 20 January 1936, Vallipuram lodged a caveat which was registered the same day.

It was held in this case that the first defendant/respondent had acquired, by the deposit with him of the issue document of title, the right to a lien over the land by registering at any time a caveat under s 134 of the Land Code (Cap 138). It was also held that as between the first defendant/respondent and the plaintiff/appellant the former had the prior equity and that his delay in presenting his caveat for registration was not an omission which operated and enured to forfeit and take away his pre-existing equitable title.

In *Mercantile Bank Ltd* v *The Official Assignee of the Property of How Han Teh*,[2] one How Han Teh deposited documents of title over certain lands with the applicants for the purpose of securing a loan. He failed to repay the loan and judgment was obtained againt him. A bankruptcy notice was issued against him but he failed to repay the moneys and thus committed an act of bankruptcy. Subsequently the applicant registered caveats against the titles deposited with them as security under s 330 of the National Land Code. A bankruptcy petition was subsequently filed and receiving and adjudicating orders were made against him. The applicants applied to sell the land by public auction. The application was opposed by the Official Assignee who claimed that the applicants were not the lien holders on the property as at the time of the act of bankruptcy, there was no caveat entered under the National Land Code. The court held that at the time when the act of bankruptcy was committed the applicants had an equitable right to a lien. They had a prior interest and were entitled to an order of sale. The court observed that the applicants had not parted with the documents of title which was in their possession all the time and it was open to them to register the caveat at any time.

In the case of *United Malayan Banking Corporation Bhd* v *Goh Tuan Laye & Ors*,[3] the United Malayan Banking Corporation Bhd (hereinafter referred to as 'the plaintiff/appellant') gave an overdraft to the defendant/respondent, a firm called Syarikat Shin Tong (hereinafter referred to as 'the firm'). On 27 April 1968, three partners of the firm deposited with the plaintiff/appellant bank documents of title relating to their lands to serve as security for the said overdraft. The plaintiff/appellant did not caveat the land as they were prohibited from doing so by the Kelantan Land Settlement Ordinance 1955. As the firm did not pay the whole or part of the amount of the overdraft, the plaintiff/appellant, on 13 April 1971, filed a suit against the firm wherein it claimed that the firm was indebted to it but there was no mention of any lien.

On various dates in 1970, ie after the date of the deposit but prior to the date of the prohibitory orders, the owners of the lands executed an agreement of sale agreeing to sell the lands to the respondents. Prior to the date of the prohibitory orders they paid in full the balance of the purchase price. No caveat was entered by them.

On 18 January 1971, the plaintiff/appellant obtained judgment in default of appearance. On 1 January 1972, the plaintiff/appellant obtained a writ of seizure and sale and prohibitory orders relating to those lands. Between 1972 and 1973 the respondents intervened and applied to set aside the prohibitory orders relating to all the 14 pieces of land. The learned judge allowed the application and set aside the prohibitory orders. On appeal the Federal Court reversed the decision and found in favour of the plaintiff/appellant.

In this case the plaintiff/appellant only had the document of title deposited with them to secure the overdraft. They have not caveated the land to protect their interest and the court said that that was not their fault because they were prohibited by law, ie the Kelantan Land Settlement Ordinance 1955, from doing so. The respondents (interveners) on the other hand had bought the lands and paid the full purchase price. They too did not caveat the lands to protect their interest. Also in their case it was not their fault as they were prevented from doing so by the same law. So when the documents of title to the lands were deposited, there were two parties with equitable interest, namely, the plaintiff/appellant, that is, the bank and the respondent (interveners) and all those interests were unregistered and unprotected by caveat. The court decided that all things being equal, the court must protect the interest of those first in time and in this case it was the plaintiff/appellant (the bank).

In *Sockalingam Mudaliar* v *Ramasamy Chettiar & Anor*[4] the brief facts are as follows. Prior to 22 January 1937, the second defendant executed two charges in favour of the first defendant in respect of three pieces of land belonging to him. At the same time a caveat was also registered at the instance of two women. On that date, ie 22 January 1937, the second defendant excuted another charge over the same three pieces of land, this time in favour of the plantiff for a consideration of $3,300. The plaintiff could not get the charge registered because he could not present the issue document of title together with his charge as required by s 129 of the Land Code because the issue document of title was in the hands of the first defendant. On 24 February 1937 the plaintiff lodged a caveat on all the lands to protect his interest. On 3 March 1937 the first defendant attached all the three pieces of land under a decree of the Ipoh Magistrate's Court in his favour against the second defendant for $359.60 and costs. The attachment was by prohibitory

order under the Civil Procedure Code. It is admitted that the first defendant had notice of the plaintiff's unregistered charge when the attachment was made. At about the same time the two earlier charges of the first defendant were discharged. On 23 December 1973, the defendant filed his defence contending that his attachment was a valid legal attachment and that he was entitled to sell all the three pieces of land free from any charge in favour of the plaintiff and to have the proceeds of the sale in priority to any claim by the plaintiff. The court decided that the unregistered charge conferred on the plaintiff an equitable interest in the lands and that the lands could only be sold in execution subject to the plaintiff's unregistered charge of 22 January 1937.

The principle in the case of *Sockalingam Mudaliar*[4] was acknowledged by the Federal Court in *Karuppiah Chettiar* v *Subramaniam*[5] when it said at p 120:

> The position in this case is somewhat similar to that in the *Sockalingam Mudaliar's* case. In that case there was an unregistered charge in respect of which a caveat had been lodged, and the court held that the equitable interests conferred by that unregistered charge ought to be protected. In the present case, the unregistered memorandum of transfer conferred a title in equity on the purchaser for the protection of which he has similarly lodged a caveat. In that case it was held that the land could be sold only subject to the unregistered charge. To say in this case that the land must be sold subject to the unregistered transfer is to say that the land cannot be sold because the judgment debtor has divested himself of all his beneficial interest in the land by that transfer, so that there is nothing to sell. If the land cannot be sold, what is the point in allowing a prohibitory order to stand on the register? I would say therefore that the learned judge in this case was quite right in following *Sockalingam Mudaliar's* case to set aside the prohibitory order.

The facts of *Karuppiah Chettiar's*[5] case, in so far as they are related for the purposes of the decision as quoted above, are briefly as follows. On 8 November 1968, one Mohammad Sharjuddin sold all his interest in an undivided 2/6 share in a certain piece of land to the respondent Subramaniam. Notwithstanding the sale, Sharjuddin remained registered as the proprietor of the said land because he was unable to deliver to the respondent the issue document of title to enable registration of the memorandum of transfer which was duly executed and stamped on the date of the sale. On 13 November 1968, the respondent obtained entry of a private caveat on the register document of title to the land to protect his interest. The appellant was one of the executors of the estate of Suppiah Chettiar, deceased. It appears that Sharjuddin had deposited the issue document of title as security for loans granted to him by the said deceased who apparently had taken no steps to lodge a lien holder's caveat against the land. On 3 March 1969, Sharjuddin executed a second memorandum of transfer in respect of the same land in favour of the executors of the deceased estate. It was on inspection of the register document of title that the executors came to know about the private caveat lodged by the respondent. On 22 April 1969, a prohibitory order was issued against the said interest in the land in execution proceedings at the instance of the appellant who had obtained judgment against Sharjuddin on a claim for recovery of money lent. On 9 May 1969 the respondent intervened by summons-in-chambers to have the prohibitory order set aside and succeeded.

In the case of *Zeno Ltd* v *Prefabricated Construction Co (M) Ltd & Anor*[6] the brief facts are as follows. The first defendants took a loan of $75,000 from the plaintiffs and executed a mortgage and general charge on 16 February 1962 and as security the first defendants deposited with the plaintiffs the title deeds of a piece of land of which they were the registered proprietors. The charge was never registered in the Land Office. The plaintiffs lodged a caveat in respect of the said land with the Collector of Land Revenue which was duly recorded in the register document of title on 23 April 1962.

On 31 October 1963 the second defendant obtained judgment for $21,514.87 against the first defendant in a suit. On 14 November 1963 the second defendant obtained a prohibitory order against the said land and presented the same to the Collector for registration under the Land Code. The order provided that it was subject to a caveat and prohibitory orders. By an order of court dated 6 February 1964, in the same suit, the second defendant obtained an order for the sale of the said land by public auction.

In April 1969 the plaintiffs commenced these proceedings. The first defendant had not repaid the principal sum of $75,000. The plaintiffs sought a judgment in the sum claimed against the first defendant and a declaration that the plaintiffs' lien on the land had priority of right, claim and interest over that of the second defendant's prohibitory order or order of sale by public auction. Regarding the deposit of the title deeds with the plaintiffs the court held that it was a lien in the nature of an equitable interest and capable of being caveated.

In the present case before me, if I may recall, the main facts were that the first defendant obtained a housing loan in the sum of $92,000 from the plaintiff bank which accepted a charge over a piece of land HS(D) 4852, Lot 24401, Mukim Kuala Kuantan. The charge was presented to the Land Office for registration. But it was not accepted because the quit rent had not been paid. So the issue document of title together with the charge were returned to the plaintiff's solicitors and thereafter they remained all the time in their possession.

In a separate action the first defendant was sued for goods sold and delivered by the second defendant (Yahya Brickworks Sdn Bhd) vide Kuantan High Court Civil

Suit No 180 of 1985 and on 25 June 1985 the second defendant obtained judgment in default (encl 3, exh SWK 9 and 10, see also para 4 of statement of agreed facts, encl 23). But before that date (11 June 1985) the second defendant lodged a private caveat over the abovementioned land (see para 6 of the affidavit of Soo Weng Kee, encl 3, and affidavit of Yap Yoon Fook). Subsequent to obtaining judgment in default the second defendant also filed and registered prohibitory orders.

On 12 August 1986, the plaintiff obtained judgment against the first defendant vide summons 24-48-86 in the sum of $97,287.37 for the non-payment of the abovementioned housing loan granted to the first defendant. On 4 March 1987, the plaintiff lodged a caveat over the said land.

On 6 March 1987, the same land belonging to the first defendant was auctioned off at the instance of the second defendant pursuant to the writ of seizure and sale obtained following the judgment in default in Kuantan High Court Civil Suit No 180 of 1985. The third and fourth defendants purchased the land on the same day at the purchase price of $85,200 and they made the full payment on 25 June 1987.

There is no doubt in my own mind as to the position of the law that by virtue of the unregistered charge dated 1 April 1985 (exh SWK 1 to encl 3) in favour of the plaintiff, the plaintiff had acquired a title in equity over the said land. As the issue document of title was all the time in the custody of the plaintiff it had acquired a lien in equity over the land: *Vallipuram Sivaguru* v *Palaniappa Chetty*[1] and *Mercantile Bank Ltd* v *Official Assignee of the Property of How Han Teh.*[2] The depositee, ie the plaintiff bank in the present case, has the right to lodge a caveat and may do so at any time under the provisions of the National Land Code.

Now, assuming that the judgment in default in the Civil Suit No 180 of 1985 had been regularly entered in favour of the second defendants, the case for the second defendants appears to be that they had acquired an equitable interest over the land with the lodging of the caveat on 11 June 1985. It was argued against the plaintiff that the plaintiff's charge in equity of 1 April 1985 did not have priority of right, claim and interest over that of the second defendant's caveat of 11 June 1985 for the reason that the plaintiff had failed to lodge a caveat to protect his equitable interest. The question here is whether the second defendant had an interest in the land in the first instance which could be protected by caveat. When the second defendant lodged the caveat on 11 June 1985, it is quite clear to me that he had no interest whatsoever upon which to base his claim to the land. Of course he had filed a suit against the first defendant for goods sold and delivered but that too had no concern with land and even then there was no judgment as yet at the time of lodging the caveat. In other words he had no caveatable interest on the land (see discussion on 'caveatable' interest under heading 'private caveat' in *Tenure and Land Dealings in the Malay States* by David Wong, pp 423-425). Section 323(1)(a) of the National Land Code must pertain to some interest on the land concerned. If I may quote David Wong:

> In a sense the present section enables a return to the principle of the early case *Re Registration of a Caveat* (1908) Innes 114 which was based on the general purpose of the caveat system and the treatment of rights under a contract of dealing in the Malay States on a similar footing as in other Torrens jurisdictions (at p 434) and
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> ... at the same time it should be equally clear that however wide a meaning may be put on the words 'any right to such title or interest', these words do not confer mere personal rights as may be distinguished from rights relating to land.(p 435)

Judith Sihombing in her book *National Land Code* at p 601 has also this to say:

> If the claim does not represent a transaction capable of registration then the claim is not caveatable for the caveat procedure 'is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularize the position by registering the instrument'... It is of course axiomatic that a personal claim (ie in general law terms a mere personal, in personam claim) enforceable only against the registered proprietor and not the land is not able to be caveated. Only claims to interests in land (ie in general law terms in rem claims) which relate to interests capable of registration can be caveated.

In the case of *Re Registration of a Caveat*[7] it was held that where a proprietor of land who had taken a loan from a moneylender gave an oral promise to charge the land by way of security, the promisee could lodge a caveat to protect what was described as 'a caveatable interest' which he had acquired in the land by reason of his promise. In the present case, if I may repeat, the second defendant had no interest whatsoever that could be called caveatable interest on 11 June 1985. The judgment in default which he obtained on 25 June 1985 was a judgment on a claim for goods sold and delivered and it speaks nothing of interest in land. So it is my considered opinion that the second defendant was not entitled under s 323(1) of the National Land Code to lodge the caveat.

Tun Suffian, the Lord President as he then was, in the case of *United Malayan Banking Corporation Ltd* v *Goh Tuan Laye & Ors*[3] at p 170 said:

> ... possession of the title gives them an equitable interest in the land, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.

At the time when the second defendant lodged his caveat, he had no valid claim over the land whether in the nature

of a legal or an equitable interest. On the other hand, the person with whom a issue document of title is deposited like the plaintiff in this case, immediately upon such deposit he acquires an equitable interest. It is not affected by the absence of a caveat. Raja Azlan Shah J, as he then was, in the case of *Mercantile Bank Ltd* v *Official Assignee of the Property of How Han Teh*[2] at p 197 said:

> The registration of a caveat does not confer priority nor does it create new rights.

At the worst I would say that a depositee of an issue document of title like the plaintiff must have a better claim to the land than a person without that document in his hand.

Assuming that I am right in my understanding of s 323(1)(a) of the National Land Code in particular with respect to the phrase 'any right to such title or interest' and that the second defendant was not entitled to lodge the caveat on 11 June 1985, then the plaintiff's charge in equity remains good and unaffected by the action of the second defendant. It follows, therefore, that any prohibitory order issued at the instance of the second defendant was of no effect because a prohibitory order upon entry has a similar effect to that of a private caveat and neither can it affect a prior claim (see *Tenure and Land Dealings in the Malay States* by David Wong, p 469 and *Karuppiah Chettiar's* case[5] where it was decided that the prohibitory order did not affect the equitable interest prevailing first in time). On the other hand the plaintiff's caveat on 4 March 1987 was properly lodged and registered to protect his interest. The question of delay in this connection is therefore not relevant. The result would be the same if reliance is placed on my second observation that at the worst the plaintiff must have a better claim to the land as he had the issue document of title all the time in his possession.

Assuming for a moment that the second defendant had some form of equitable interest on the land which I cannot accept, the question is: would the second defendant have priority of equity as against the plaintiff? If I may cite the words of Justice Terrell, Acting Chief Justice as he then was, in the case of *Vallipuram Sivaguru*[1] at p 58:

> This brings me, therefore, to the only issue which was stressed by Mr Jeff in the Court of Appeal where he argued that by failure to register the caveat earlier the first defendant had been negligent and lost his priority ... shortly the proposition is this – Nagappa Eliathamby himself could not obtain specific performance against Gan Inn because the remedy would be purely equitable and no court of equity would compel Gan Inn to transfer absolutely to Nagappa Eliathamby property in which he had already given an interest to the first defendant for valuable consideration... The cases such as *Abigail* v *Lapin* [1934] AC 491, 505 and *Rimmer* v *Webster* [1902] 2 Ch 163 are cases in which the holder of an equity has parted with the indicia of title thereby enabling a fraud to be perpetrated upon innocent third parties. In such cases the holder of the equity has been held to lose his priority because his negligence had made the fraud possible.

In the present case, just as in *Vallipuram's* case[1] the issue document of title had been given to the plaintiff for valuable consideration, that is, a loan, and that all the time the issue document of title was in the possession of the plaintiff. The question is whether in the present case the plaintiff has lost his priority of equity through his negligence. It was alleged that because the plaintiff had been negligent on the ground that there was delay because the relevant documents, including issue document of title, had been kept in a drawer of Miss Catherine Thong all along and only discovered after she had left the plaintiff counsel's firm was no excuse and that caveat could have been lodged. The reason given that the plaintiff's counsel did not realize that the said documents had been returned by the Land Office and that they were all the time in the drawer of the clerk, Miss Catherine Thong, who had then left the firm (see affidavit of counsel encl 17, para 7 to 9), to my mind, is reasonable enough. The important thing is that the issue document of title has not parted from their possession. In a separate action which has nothing to do with the said land or any land and neither with the plaintiff, but for goods sold and delivered, the second defendant sued the first defendant and obtained judgment in default. Can the plaintiff be said to be at fault in the way of handling the issue document of title? Can the second defendant effect a transfer of the land? To both questions the answer should be 'no'. In the *Mercantile Bank* case,[2] all the transactions are related to one another and this emanated from one transaction, ie the granting of the loan to Goh Tuan Laye and the documents of title to the land were deposited with the Mercantile Bank as security for the loan. As he could not repay the loan a bankruptcy notice was issued and served on him. He failed to pay the moneys and therefore he had committed an act of bankruptcy. Here the Official Assignee's title in land was an interest in equity. But the absence of a caveat did not affect the equitable interest of the bank which was first in time. In the present case before me the second transaction was really a separate action unrelated to the first and had no reference to any interest in land. In the present case also there were no competing equities, if it is accepted that the second defendant had no equitable interest in the land, and that his caveat of 11 June 1985 was of no effect therefore.

Similarly, in the case of *United Malayan Banking Corporation* v *Goh Tuan Laye & Ors*,[3] the two transactions had direct concern with the said land. Overdraft facilities were granted and to secure those facilities documents of title were deposited with the bank (plaintiff/appellant). The second transaction involved the sale of the said lands to the interveners effected by executing a sale agreement which took place after the deposit of the

title deeds. In both transactions, no caveat could possibly be registered in view of a prohibition under the Kelantan Land Settlement Ordinance 1955. In this case it was simply a question of whose equity was first in time. It was of course that of the bank (plaintiff/appellant). There was no question of the plaintiff/appellant being guilty of any act or omission 'which had or might have the effect of inducing the respondents to act to their prejudice'. In this case the interest in the two transactions were both in the nature of a caveatable interest except that the caveats were prevented by law to be registered.

In *Sockalingam Mudaliar's* case,[4] after the defendant's two registered charges were paid off and the discharges were registered, what was in effect left then was the unregistered charge of the plaintiff who lodged and duly registered a caveat to protect it. Then came the attachment over the same land at the instance of the first defendant. So, after the withdrawal of the caveat by the two women,the only transaction subsisting were the plaintiff's equitable interest, ie the unregistered charge, and the first defendant's attachment. Of course the court must protect the plaintiff's equitable interest. Here the question of priority was quite clear while the question of caveatable interest was not in issue. So also in the *Karuppiah Chettiar's* case,[5] the question of the equity did not arise as the judgment debtor, ie the owner of the land, after having sold his land to Subramaniam had no more interest left to sell.

Again in the *Zeno Ltd* case,[6] it is quite clear that the plaintiffs being the depositees of the title deeds in respect of the lands concerned though the charge was never registered had an equitable interest in the lands and which was therefore caveatable. A caveat was lodged, however, by the plaintiffs. Subsequently, the second defendant obtained a prohibitory order against the said land following judgment for $20,514.87 given in his favour in a separate suit against the first defendants. If I may note here, it is not known as to the nature of the claim for which the said judgment was given in favour of the second defendant. Even assuming that the second defendant had an equitable interest which was therefore caveatable as a result of the said judgment, the plaintiffs' equitable interest being first in time would in any case prevail. All the more so as there was a caveat lodged by the plaintiffs while none was lodged by the second defendant. As I mentioned a moment ago that it was not known whether the nature of the second defendant's interest was caveatable or not, the prohibitory order which the second defendant obtained in any event would not be able to assist or rescue him in establishing his interest over that of the plaintiffs.

In the circumstances of the present case the plaintiffs' equitable charge dated 1 April 1985 and, of course, his caveat dated 4 March 1987 must prevail and accordingly the writ of seizure and sale issued in the Kuantan High Court Civil Suit No 180 of 1985 including the auction sale held on 6 March 1987 must be set aside.

One further point that perhaps I need mention is in regard to the question of the regularity or otherwise of the auction sale held on 6 March 1987. Procedurally, it was argued before me that the sale ought not to be set aside in view of the proviso to r 7(e) of O 47 of the Rules of the High Court 1980. This argument was taken up on the premise, as I understand it, that the second defendant had an equitable interest in the land or a better equity, which I found he had none. Nevertheless, assuming that he had, I find that the argument must also fail in view of the facts of this case. The first writ of seizure and sale issued on 7 November 1985 expired on 7 November 1986. No application for extension of time was ever made before 'the day next following that on which the writ would otherwise expire'. Instead a fresh writ was applied for on 24 February 1987, some four months afterwards. A prohibitory order (the third one) was registered on 5 March 1987. The auction was carried out the next day. This, in effect, contravened r 7(a) of O 47 of the Rules of the High Court 1980 which requires that 'there shall be no sale until the expiration of 14 days from the registration of the prohibitory order under r 6(3) of the Order'.

I must say that the proviso to r 7(e) does not apply to cure the so-called irregularity. The irregularity or fraud for that matter must relate to the conduct and proceedings of the sale itself and not to the time when the sale must take place. Neither can this irregularity be cured by O 2 r 1 because the said r 7(a) has its purpose. For example, a judgment debtor is still given the right to apply for the postponement of the sale after the registration of the prohibitory order as provided under r 7(c). The 14-day rule must therefore be strictly complied with. For failure to do so, the sale must be set aside. Looking at it in another way, now that the third and fourth defendants have purchased the land and it is said that they have acquired an equitable interest in the land, the question of competing equities did not arise because the plaintiff's equity was first in time and so was his caveat. I must also note here that it was a public auction and parties would have notice of the plaintiff's interest. No amount of allegation of lack of notice of the plaintiff's interest can ever be accepted in the circumstances just because the sale was carried out the day following the registration of the third prohibitory order while the 14-day grace was being conveniently ignored. This is clearly a case of a wanton failure to comply with the 14-day rule.

I therefore granted the reliefs as prayed for.

Application allowed.

Solicitors: *Andrew Wong & Co*; *HY Lee & Hee*; *Siva, Ram & Associates*.

Reported by *Ng Sheau Jiuan*